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NO.

in the

Supreme Court

of the

United States

October Term, 1983

LARRY SIKES, Et. Al.,

Petitioners

vs.

EDDIE BOONE, Et. Al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March 9, 1984

QUESTION PRESENTED

This appeal raises a substantial federal question of equal protection with respect to the fundamental and State consitutional right of employees to bargain collectively. This petition is based upon the following issue:

WHERE FLORIDA'S CONSTITUTION PROVIDES ALL EMPLOYEES INCLUDING LAW ENFORCEMENT OFFICERS AND OTHER LAW ENFORCEMENT PERSONNEL WITH THE RIGHT TO BARGAIN COLLECTIVELY, IS IT A DENIAL OF EQUAL PROTECTION TO EXCLUDE A PARTICULAR CLASS OF DEPUTY SHERIFF FROM THE ENJOYMENT OF THIS FUNDAMENTAL, STATE CONSTITUTIONAL RIGHT?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioners, LARRY SIKES, JULIE DENSON, WILLIE REAMS, WILLIAM STAFFORD and the FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on December 13, 1983.

OPINION BELOW

The opinion of the Court of Appeals, which is not published, appears in the Appendix hereto. The opinion of the District Court for the Northern District of Florida is reported at 562 F.Supp. 74 (N.D. Fla. 1983) and is also set forth in the Appendix of this petition.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Eleventh Circuit was entered on December 13, 1983. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article 1, Section 6 of the Florida Constitution:

> Right to Work—The right of persons to work shall not be denied or abridged on account of membership or non membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged. Public employees shall not have the right to strike.

Section 447.203(3), Florida Statutes (1981):

> (3) "Public Employee" means any person employed by a public employer except:
>
> (a) Those persons appointed by the Governor or elected by the people, agency heads, and members of boards and commissions.
>
> (b) Those persons holding positions by appointment or employment in the organized militia.
>
> (c) Those individuals acting as negotiating representatives for employer authorities.
>
> (d) Those persons who are designated by the commission as managerial or confidential employees pursuant to criteria contained herein, upon application of the public employer or of an

organization filing a petition for certification pursuant to s. 447.307.

(e) Those persons holding positions of employment with the Florida Legislature.

(f) Those persons who have been convicted of a crime and are inmates confined to institutions within the State.

STATEMENT OF THE CASE

This petition arises out of a complaint for declaratory relief filed by Larry Sikes and several other similarly situated Florida deputy sheriffs in July, 1980. The complaint, which was brought as a class action under 42 U.S.C. §1983, alleged violations of plaintiffs' First and Fourteenth Amendment rights due to the exclusion of a class of deputy sheriffs from the right to collectively bargain secured by Article 1, Section 6 of the Florida Constitution and implemented by the Florida Public Employees Relations Act (hereafter PERA), Chapter 447, Part II, Florida Statutes. Both lower courts held that the exclusion of the class of deputy sheriff from the fundamental right to collectively bargain was not violative of plaintiffs' constitutional rights secured by the First and Fourteenth Amendments.

The Florida Constitution contains a unique provision. It grants every employee in the State of Florida, whether working in the private or public sector, the right to bargain collectively. *Fla. Const.* Art. 1, §6.

In 1974, the Florida Legislature passed legislation implementing this State consitutional right for Florida's public sector employees. Under PERA, practically every class of individuals working in Florida's public sector enjoys the right to bargain collectively. Classes of individuals excluded from the right to bargain are specifically delineated in the Statute. *See*, Section 447.203(3), Florida Statutes. Section 447.203(3) does not specifically exclude deputy sheriffs working for a "constitutional sheriff" from the right to bargain.

In 1978, in a case involving parties different than those involved in this case, the Florida Supreme Court determined that deputy sheriffs working for Florida's "constitutional" sheriffs do not enjoy the right to bargain collectively and are excluded from the coverage of PERA. *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978). While the Florida Supreme Court found no specific exclusion for such deputies, it determined that deputy sheriffs had, at common law, been considered officers, not employees, and, therefore, were excluded from enjoyment of the right to bargain collectively.

As previously stated, in 1980 Sikes initiated the federal action which serves as the basis of this petition. Simply stated, it was Sikes' legal contention that the class line drawn in the *Murphy* case violates the Equal Protection clause of the Fourteenth Amendment.

The facts which serve as the basis of Sikes' claim have been stipulated by the parties to the case. The facts establish that deputy sheriffs working for a Florida consitutional sheriff are law enforcement officers. All other law enforcement officers in the State enjoy the right to bargain; this particular class of deputy does not. State highway patrol officers enjoy the right to bargain, as do the State's fish, wildlife and marine patrol officers. Municipal law enforcement officers enjoy the right to bargain.[1] Even certain classes of deputy

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[1]There are a series of Florida cases that define municipal police officers to be common law "officers" rather than employees. *See, Curry v. Hammond*, 16 So.2d 52 (Fla. 1944).

sheriffs enjoy the right to bargain but not deputy sheriffs working for a constitutional sheriff.[2]

Deputy sheriffs working for a constitutional sheriff do work for a public employer, the sheriff. The sheriff's deputized workers exercise law enforcement responsibilities. The sheriff's non-deputized employees do not exercise law enforcement responsibilities. The non-deputized employees working for a constitutional sheriff enjoy the right to bargain, but not deputy sheriffs working for the same constitutional sheriffs.

Deputy sheriffs working for a constitutional sheriff share near identical training requirements, responsibilities, functions, duties, and benefits with the remainder of the State's law enforcement officers. All must be certified pursuant to Section 943.13-943.15, Florida Statutes. All must retain that certification in order to serve as a law enforcement officer. All are vested with the authority to bear arms and make arrests. All have the primary work responsibility of preventing and detecting crime and the enforcement of the penal, criminal, traffic and highway laws of the State.

On a day-to-day basis, all law enforcement officers perform nearly identical functions and duties. All work for law enforcement agencies which are generally organized on a paramilitary basis. All enjoy certain

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[2]Two classes of deputy sheriffs enjoy the right to bargain: (1) deputy sheriffs employed by a sheriff pursuant to a county civil service system which allows for collective bargaining, such as Escambia County, Florida, and (2) deputy sheriffs employed by a sheriff of a "charter county," such as Duval, Dade and Volusia Counties, Florida.

benefits such as participation in a special risk retirement class and receipt of salary incentive monies for advanced education in the field of law enforcement. As previously stated, all enjoy the right to bargain, but not deputy sheriffs working for constitutional sheriffs.

REASONS FOR GRANTING WRIT

1.

THE DECISION BELOW HAS DECIDED A FEDERAL QUESTION IN A MANNER INCONSISTENT WITH APPLICABLE DECISIONS OF THIS COURT.

The Eleventh Circuit's application and analysis of the equal protection standard in this case substantially departs from numerous decisions of this Court. Under the Eleventh Circuit's application of the equal protection standard, a Federal Court's role, when sitting in review of State legislation defining classifications which will enjoy certain fundamental rights, is merely to examine the class to ascertain whether a "basis" for distinction can be articulated. This "deference" standard is clearly inconsistent with the equal protection standard enunciated by this Court and which requires the Court to assess both the nature of the right involved and its present day status in society in determining whether the classifications established are valid. *See, Califano v. Goldfarb*, 430 U.S. 199, 207 (1977) and *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972).

The Equal Protection Clause of the Fourteenth Amendment provides that, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws". A state statute may treat people differently, but classifications made in a statute must be reasonable. The reasonableness of statutory classifications will be determined by the specific standard to be applied. Under the traditional two-tier approach, a strict scrutiny is triggered by a suspect classification (race, nationality,

alienage) or a fundamental interest such as the right to vote or the right to interstate travel. The statute must promote a compelling state interest and be the least onerous alternative available. Under the traditional equal protection test the classification is valid if there is any conceivable basis upon which the classification might relate to any legitimate governmental interest. Under this standard of "any debatable basis", it would be very difficult for a law to fail this test.

In applying this "any debatable basis" standard for equal protection analysis, the Court has set forth the following criteria:

(a) "The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without reasonable basis and therefore is purely arbitrary."

(b) "A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in practice it results in some inequality."

(c) "When the classfication in such law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."

(d) "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Lindsy u Natural Carbonic Gas Co., 220 U.S. 61 (1911).*

The standard of review applied by the Eleventh Circuit was clearly the ratio al basis, or "any debatable basis" test. Turning to the Memorandum Opinion of the United States Court of Appeals for the Eleventh Circuit, the Court stated:

> Because the court has found that the classification, created by the state supreme court's interpretation of section 447.203, *Florida Statutes*, does not interfere with a federal "fundamental right", the standard of review to be applied is the rational basis test. Under the rational basis test, statutory classifications are presumed constitutional. *United States Court of Appeals For the Eleventh Circuit Memorandum Opinion* at 11.

It is well established that a different standard of review is mandated where a suspect classification or a fundamental interest triggers the Equal Protection analysis. This higher standard of review is the strict scrutiny test. Under the strict scrutiny standard of review, a state statute must promote a compelling state interest and must be the least onerous alternative available. The Eleventh Circuit erred as a matter of law is not applying the strict scrutiny standard of review. As set forth above, the Eleventh Circuit stated that because the Florida Supreme Court's interpretation

of Section 447.203, *Florida Statutes*, does not interfere with a Federal "fundamental right", the appropriate standard of review to be applied was the weak scrutiny or rational basis test. *Memorandum Opinion at 11.* Where a state constitution expressly grants a specific right or rights to its citizens, the federal courts must apply a strict scrutiny standard of review in determining whether state law requirements relating to the exercise of the state constitutional rights are violative of the equal protection clause. In other words, any state law or state statutes placing restrictions or requirements on the exercise of the state constitutional rights must be shown by the state to be necessary to further a "compelling state interest". As previously set forth in the "State Constitutional and Statutory Provisions Involved" section of this Petition, Article I, Section 6 of the Florida Constitution grants to employees the right to bargain collectively by and through a labor organization. Furthermore, Section 447.203(3), Florida Statutes (1981), defines "Public Employees" and that statute specifically excludes from the right to bargain certain classes of individuals. Section 447.203(3) does not specifically exclude deputy sheriffs working for a "constitutional sheriff" from the right to bargain. However, the Florida Supreme Court has determined in *Murphy v. Mack* that deputy sheriffs are excluded from the coverage of Section 447.203(3), *Florida Statutes*. The Florida Supreme Court in *Murphy v. Mack*, therefore creates a distinction in that it treats similarly situated people in a dissimilar manner, thereby triggering the equal protection analysis.

The Eleventh Circuit Court of Appeals erred in its statement that because the Florida Supreme Court's interpretation of who was a "public employee' pursuant

to the Florida Statutes does not interfere with a *federal fundamental right*, the standard of review to be applied is that rational basis standard. In the United States Supreme Court's decision of *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L. Ed. 2d 274 (1972), the Court applied the strict scrutiny test in invalidating a state law which placed requirements on a state constitutional right which was not a federal fundamental right. The operative fact in *Dunn* is that Tennessee law placed a durational residence requirement on a Tennessee constitutional right, the right to vote. Despite the fact that there is no express United States Constitutional Right to vote in state elections, the Court stated that "the State must show a substantial and compelling reason for imposing durational residence requirements . . . By denying some citizens the right to vote, such laws deprive them of a fundamental political right . . . preservative of all rights."

The issue at bar is analagous in that the Florida Supreme Court has distinguished a class of people, deputy sheriffs, in such a manner as to deny their fundamental right to bargain collectively by and through a labor organization, as expressly set forth in Article I, Section 6 of the Florida Constitution. The standard of review is therefore to look at the benefit withheld by the classification (the state constitutional right to bargain collectively by and through a labor organization) and the basis for the classification (the State Court's decision that deputy sheriffs had, at common law, been considered officers, not employees, and therefore were excluded from enjoyment of the right to bargain collectively). The Eleventh Circuit did not look at the individual interest affected by the classification, nor did the Court look to the benefit withheld by the classification or the

basis for the classification. The federal courts are mandated to look at the benefit withheld by the classification, the basis for the classification, and where that benefit is expressly granted by the state constitution, the federal court must conclude that the state must show a substantial compelling reason for imposing requirements or restrictions on the state constitutional right. The Florida constitutional provision guaranteeing public employees the right to collectively bargain is a fundamental right within Florida.

The importance of the Equal Protection Clause of the Fourteenth Amendment as it relates to State legislation cannot be doubted. It is designed to achieve a single significant purpose: to ensure to all persons equal application of State law by prohibiting a State from drawing a legal line which constitutes an invidious discrimination against a particular class of persons. *Stanley v. Illinois*, 405 U.S. 645 (1972). In short, all persons in similar circumstances must be treated alike. *Johnson v. Robinson*, 415 U.S. 361 (1974).

Obviously, if the Equal Protection Clause is to achieve its intended purpose respecting State legislation, it is incumbent on the Federal Court to actively review such legislation under a consistent, established standard. "Deference" to a State in the hope that it will solve a problem on its own is not within the province of the Court where a violation of the Equal Protection Clause is established.

The legal standard enunciated by this Court for equal protection purposes is clear as set forth above. Initially, the Court will assess the nature of the right involved since the degree of examination of the

classifications and the deference that will be accorded to the State in establishing the classifications is dependent on the nature of the right involved. *Dunn v. Blumstein*, 405 U.S. at 335. Next, the Court will examine the classifications to determine whether they are based on substantial differences of conditions and those differences have a substantial and *continuing* relation to the object of the legislation involved. *Califano vs. Goldfarb*, 430 U.S. 199,207 (1977) and *Brown v. Board of Education of Topeka*,347 U.S. 483,492-493 (1954). Finally, the Court will examine the classifications to determine whether persons, comparably situated, are treated in a fair and equal manner or whether the classifications established offend the plain standards of common sense. *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32,37 (1928) and *Hartford Co. v. Harrison*, 301 U.S. 459,462 (1937).

As an examination of the Eleventh Circuit's decision will establish, the Court chose not to follow the format for analysis articulated by this Court. There was no analysis of the nature of the right to bargain collectively, although it is a fundamental right. There was no analysis of the "presence" of the right to bargain collectively in today's society. There was no analysis of whether the common law distinctions drawn between "officers" and "employees" bear a relation to the right to bargain collectively under Florida's PERA. There was no analysis to determine if similarly situated persons were treated equally. There was no analysis as to whether the classification established violated plain standards of common sense. There was merely a circuitous examination of the historical status of Florida's deputies and a conclusion that "since it has always been that way in Florida, it's okay." Instead, the Court adopted an approach

of total deference to the Florida Supreme Court and its decision in *Murphy v. Mack*, 358 So.2d 822 (Fla. 1978).

Sikes would respectfully submit to this Court that the Eleventh Circuit's application and analysis of the equal protection standard in the instant case so substantially departs from the well-established standards enunciated by this Court that a writ should issue to review the decision of the Eleventh Circuit.

2.

THE DECISION BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Eleventh Circuit's decision settles several important questions of Federal law which should be resolved by this Court. The decision determines that status and nature of review Federal Courts will apply when reviewing State legislation implementing a State Constitutional right to bargain collectively.

The significance of the Eleventh Circuit's decision is best understood in light of certain other facts. First, numerous Federal Courts have recognized the right to bargain collectively as being a fundamental, constitutionally protected right. *Thomas v. Collins*, 323 U.S. 516,531-534 (1945) and *N.L.R.B. v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 33 (1937). The right has been acknowledged as extending to all forms of employment, both public and private. *See, United Federation of Postal Clerks v. Blount*, 325 F.Supp. 879,883 (D.D.C. 1971) (three judge Court) *aff'd* 404 U.S. 802 (1971) and *United Steelworkers of America v. University of Alabama*, 599 F.2d 56,61 (5th Cir. 1979).

Next, in the past decade over 38 States have authorized some form of collective bargaining for their public sector employees. *See*, Hein, *Constitutional Implications of a Federal Collective Bargaining Law for State and Local Government Employees*, 11 Creighton L. Rev. 863,865 (1978). *See also*, Williams, *Alternatives to the Right to Strike for Public Employees: Do They*

Adequately Implement Florida's Constitutional Right to Collectively Bargain? 7 Fla. St. Univ. L. Rev. 475, 496-504 (1979). Thus, it is clear the right to bargain collectively is of ever increasing importance to America's public sector employees.

Finally, the development of State legislation dealing with the right to bargain for public sector employees has spawned a number of Federal cases which deal with the classifications established for purposes of bargaining. Consistently, these cases have dealt with the issue of whether the granting of the right to certain classes of employees, while denying it to other classes, constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment. *See, Confederation of Police v. City of Chicago*, 529 F.2d 89 (7th Cir. 1976); *Truck Drivers, Local 728 v. City of Atlanta*, 468 F.Supp. 620 (N.D. Ga. 1979); *University of New Hampshire of the A.A.U.P. v. Haselton*, 397 F.Supp. 107 (D.N.H. 1975); and *Berenguer v. Dunlavey*, 352 F.Supp. 444 (D.Del. 1972) [*vacated for mootness*, 414 U.S. 895 (1973)].

Despite the fact that numerous Federal Courts have had to deal with a legal issue similar to the one presented in the instant case, this Court has never authoritatively dealt with either the issue of the nature of the right to bargain in the public sector or the standard of review to be utilized in assessing classes established under State legislation which implements the State constitutional right to bargain.

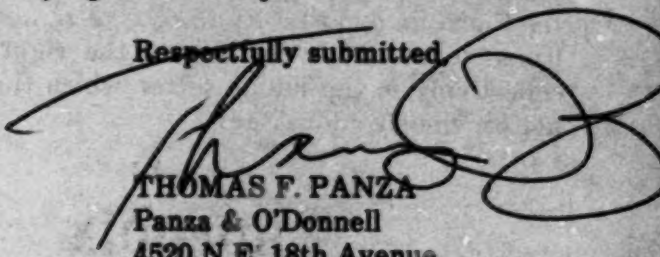
This case offers the Court a unique opportunity to address the issues raised both in the context of a State constitutional right and in the context of State legislation implementing the right. The case will be a "bellweather"

decision for the thousands of deputy sheriffs in Florida and the tens of thousands of public employees in other States that have been denied the right to bargain by other State legislation. Thus, the instant case offers the Court an opportunity to resolve significant, broad-based legal issues relating to the right to bargain collectively in the public sector which this Court has not previously addressed.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,



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Appendix

Opinion and Judgment, District Court

Opinion and Judgment, Court of Appeals

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. TCA 80-0907

LARRY SIKES, et al.,

Plaintiffs,

vs

EDDIE BOONE, et al.,

Defendants.

JUDGMENT

After hearing on the parties' cross motions for Summary Judgment and pursuant to Memorandum Opinion issued by this Court, denying Plaintiffs' Motion for Summary Judgment and granted Defendants' Motion for Summary Judgment, it is

ORDERED and ADJUDGED that the Plaintiffs take nothing, that this action be dismissed on the merits, and that the Defendants shall go hence without day.

DONE AND ORDERED in chambers at Tallahassee, Florida this 31st day of January, 1983.

Maurice M. Paul
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

CASE NO. TCA 80-0907

LARRY SIKES, et al.,

Plaintiffs,

vs

EDDIE BOONE, et al.,

Defendants.

MEMORANDUM OPINION

THIS CAUSE is before the court for consideration of cross-motions for summary judgment. In this class action the plaintiffs represent themselves and all other similarly situated persons who are deputy sheriffs appointed by the sheriff of any of the counties of the State of Florida, except Duval County, Escambia County, Metropolitan-Dade County, and Volusia County. The named plaintiffs also represent all employee organizations which seek to represent the deputy sheriffs employed in any county in the State of Florida. The named defendants represent a class of all sheriffs of the counties of Florida, except the sheriffs of Duval County, Escambia County, Metropolitan-Dade County, and Volusia County.

The court finds this action to be a proper one for summary judgment. Rule 56(c), *F.R.Civ.P.*, sets the standard for determining whether summary judgment is proper. "The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law". The parties here have filed a stipulation of facts which resolves any issue as to any material facts. The only dispute remaining is a question of law which this court can now resolve.

At the heart of this dispute is the Florida Supreme Court's interpretation of its own state's statute, the Public Employees Relations Act, Chapter 447, Part II, *Florida Statutes*, In the case of *Murphy v Mack*, 358 So.2d 822 (Fla. 1978), the Florida Supreme Court held that deputy sheriffs appointed by constitutional sheriffs were not "public employees" within the contemplation of the Public Employees Relations Act. In reaching that determination, the Court first noted that section 447.203(3), *Florida Statutes*, defines a "public employee" as "any person *employed* by a public employer". (emphasis added). The Court further noted that section 30.07, *Florida Statutes*, provides that "[s]heriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them. . . ." Reading those statutes in *pari materia*, the supreme court concluded that

> [a] sheriff is authorized to appoint deputies, for whose acts he is responsible, to act in his stead. A deputy sheriff holds office by appointment rather than employment and is vested with the same sovereign power as the chief law enforcement officer of the county. The relationship between sheriff and deputy has not been recognized by this Court to be that of employer and employee.

Murphy v Mack, *supra*, 358 So.2d at 825. Thus, the court held that "[s]ince deputy sheriffs have not been identified as employees by the courts of this state, we cannot assume that the Legislature intended to include them within the definition of public employee without express language to that effect". *Murphy v Mack*, *supra*, 358 So.2d at 826.

It is well-settled that federal courts are bound by the interpretation placed on state statutes by the highest court of the state. *See NAACP v Button*, 371 U.S. 415, 83 S.Ct.328, 9 L.Ed. 2d 405 (1963); *Die Burg, Inc. v Underhill*, 465 F. Supp. 1176 (M.D. Fla. 1979). When a challenge is made to a state statute, and that statute has been authoritatively construed by the state's highest court, the words of the court become the words of the statute. *See NAACP v Button*, *supra*. In the case at bar, then, this court is bound by the Florida Supreme Court's construction of section 447.203(3); that is, the section must be read to include among its stated exceptions deputy sheriffs who are appointed by a sheriff.

The fact that this court is bound by the Florida Supreme Court's interpretation of section 447.203(3), *Florida Statutes*, does not, however, preclude this court from further examination of the plaintiffs' claim. While the state supreme court is the final authority on the construction of state statutes, it is incumbent on this court, when a federal constitutional challenge is made, to determine whether that construction comports with the requirements of the Constitution. *See Williams v Wainwright*, 493 F.Supp. 153, 154 n. 2 (S.D. Fla. 1980). Thus, even if a state supreme court has ruled that a statute contains no constitutional deficiencies, this court

would not be bound by those state determinations on federal constitutional issues. *See Hunt v Roth*, 648 F.2d 1148, 1155 (8th Cir. 1981); *Woods v Holy Cross Hospital*, 591 F.2d 1164, 1171 (5th Cir. 1979). Federal courts must respect and give deference to the highest appellate court of a state which has ruled that a statute contains no constitutional deficiencies. However, as the Eighth Circuit noted:

> [I]t is still incumbent upon this court to analyze the state law to see if it conflicts with the federal constitution. *See* Art. VI, U.S. Constitution. If a conflict exists, we have no alternative; it is our judicial responsibility to make the hard decision and declare the . . . provision invalid.

Hunt v Roth, supra, 648 F.2d at 1155.

In this action, the plaintiffs seek a declaratory judgment that the state supreme court's interpretation of section 447.203, *Florida Statutes*, is violative of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and additionally violates Art. I, §6 of the Florida Constitution. Plaintiffs also seek a permanent injunction which would enjoin the Florida Public Employees Relations Commission (PERC) from enforcing the supreme court's interpretation. The plaintiffs contend that the Florida Supreme Court's holding in *Murphy v Mack, supra*, excluding deputy sheriffs appointed by constitutional sheriffs from the Public Employees Relations Act, denies them their constitutional right to freedom of association, and more particularly, denies them their constitutional right to bargain collectively.

The plaintiffs further assert that by being classified as "appointees" rather than as "employees" they are denied equal protection of the law in that other similarly situated law enforcement officers are permitted to bargain collectively while they are not. Simply stated, the question of law for this court's determination is whether the state court's determination that deputy sheriffs are not "employees" for purposes of state statutes and the Florida Constitution violates the Federal Constitution.

As noted previously, this court is bound by the interpretation given a state statute by a state's highest court, *See NAACP v Button, supra.* It follows, *a fortiori*, that federal courts are also bound by a state court's determination that a particular type of worker is not an "employee" for purposes of state statutes.[1] This is especially true where, as here, the worker enjoys a unique historical status such as that enjoyed by deputy sheriffs in the State of Florida. In paragraph 36 of their complaint, plaintiffs allege that the state court's determination that they are "appointees" rather than "employees" is an "illusory, meaningless distinction" based on a "word of art". This court disagrees with the plaintiffs' characterization.

The office of deputy sheriff dates back to early England and was adopted in many parts of this country as part

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[1]Both the Eleventh Amendment and the interests of federal-state comity warrant this conclusion. This court recognizes that federal courts are not bound by a state's determination that a particular type of worker is not an "employee" when a claim is made under a federal statute such as Title VII of the Civil Rights Act. *See Hishon v King & Spalding*, 678 F.2d 1022 (11th Cir. 1982); *Calderon v Martin County*, 639 F.2d 271 (5th Cir. Unit B 1981).

of the English common law.[2] It is well settled in Florida and several other states, notably Louisiana, Georgia, Texas, and South Carolina, that the office of deputy sheriff is a common-law office. As noted in 70 Am. Jur. 2d *Sheriffs, Police and Constables* §2, cited with approval by the Florida Supreme Court in *Murphy v Mack*, *supra* at 825:

> The office of under or deputy sheriff is a common-law office; and this is the rule unless a change is effected by the constitution or statute law of the state. He holds an appointment, as distinguished from an employment. Where so clothed with power, a deputy sheriff is a public officer, although he may not be a state or municipal officer within the meaning of constitutional provisions.

Because of this unique historical status, state and federal courts alike have held that a sheriff has absolute control over the selection and retention of his deputy sheriffs. *See Tanner v McCall*, 625 F.2d 1183 (5th Cir. 1980), *cert. denied*, 451 U.S. 907, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981) (applying Florida law); *Barrett v Thomas*, 649 F.2d 1193 (5th Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S.Ct. 1969 (1982) (applying Texas law); *Allen v Fidelity and Deposit Company of Maryland*, 515 F.Supp. 1185 (D.S.C. 1981) (applying South Carolina law); *Slack v Bishop*, 444 F.Supp. 1161 (W.D. La. 1978) (applying Louisiana law). As a result, courts have held that deputy

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[2]By statute, the common and statute law of England which was in effect prior to July 4, 1976 was expressly adopted in the State of Florida. Fla. Stat. §2.01.

sheriffs have no property or liberty interests in their positions for purposes of the Fourteenth Amendment of the United States Constitution. *See*, e.g., *Tanner v McCall*, *supra*.

Because this court has concluded that it is bound by the Florida Supreme Court's determination that deputy sheriffs are not "employees" for purposes of the state's statutes and the Florida Constitution, only two issues remain. Those are: whether the plaintiff class members, as "appointees", have First Amendment rights which are being violated by the defendants in this action; and, whether the State's determination that the plaintiff class members are "appointees" violates the Equal Protection Clause of the Fourteenth Amendment.

In paragraph 39 of their complaint, the plaintiffs allege that they are being denied their constitutional right to associate together because the defendant sheriffs have refused to recognize or negotiate with the plaintiffs' employee organization, the Florida Police Benevolent Association, Inc. The United States Supreme Court recently addressed this issue in *Smith v Arkansas State Highway Employees*, 441 U.S. 436, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979). In *Smith*, the Arkansas State Highway Commission refused to consider grievances which were filed by the union representing state highway department employees. The employees and their union filed suit, claiming that this infringed on their First Amendment rights. The Supreme Court held that the

actions of the Highway Commission did not violate the Federal Constitution. In so holding, the Court stated:

> The First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances. And it protects the right of associations to engage in advocacy on behalf of their members.
>
> * * *
>
> But the First Amendment does not impose any affirmative obligation on the government to listen, to respond, or . . . to recognize the association and bargain with it.
>
> In the case before us, there is no claim that the Highway Commission has prohibited its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas. There is, in short, no claim of retaliation or discrimination proscribed by the First Amendment. Rather, the complaint of the union and its members is simply that the Commission refuses to consider or act upon grievances when filed by the union rather than by the employee directly.
>
> * * *
>
> We may assume that it would and further, that it tends to impair or undermine—if only slightly—the effectiveness of the union in representing the economic interests of its members.

> But this type of "impairment" is not one that the Constitution prohibits. Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.

441 U.S. at 464-66; 99 S.Ct. at 1827-28 (footnotes and citations omitted). *See Hanover Township Federation of Teachers v Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972). So, too, in this case, the plaintiffs claim that the sheriffs and the Florida Public Employees Relations Commission refuse to recognize the employees organization which represents the deputy sheriffs. Guided by the holding in *Smith, supra*, this court finds that such conduct does not violate the First Amendment of the United States Constitution. The plaintiffs have presented no facts which would indicate that their First Amendment right to associate together is being denied. They have not directed the court to any statute or rule which prohibits deputy sheriffs from joining an employees organization. Their sole claim is that the sheriffs and the Public Employees Relations Commission refuse to recognize the organization which they have selected to represent them. As this court has already indicated, such a claim does not rise to the level of a constitutional violation.

The plaintiffs further claim that they have a constitutional right to collective bargaining which is being violated by the sheriffs and the Public Employees Relations Commission. They assert that the right to engage in collective bargaining has been recognized as "fundamental" under the United States Constitution. In support of that proposition the plaintiffs cite, *inter*

alia, *United Federation of Postal Clerks v Blount*, 325 F.Supp. 879, 883 (D.D.C. 1971) (three judge court), *aff'd.* 404 U.S. 802 (1971); *United Steelworkers, etc. v University of Alabama*, 599 F.2d 56, 61 (5th Cir. 1979); *Police Officers' Guild, National Union of Police Officers v Washington*, 369 F.Supp. 543, 551 (D.D.C. 1973); *Thomas v Collins*, 323 U.S. 516, 532-534, 65 S.Ct. 315, 324, 89 L.Ed. 430 (1945). However, after a review of the cases cited by the plaintiffs, it appears to this court that the term "collective bargaining" as the plaintiffs view it differs from the definition given the term by the federal courts.

The court notes initially that the early Supreme Court pronouncements on the issue of collective bargaining were made in cases involving the National Labor Relations Act (hereinafter "NLRA"). In *National Labor Relations Board v Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), the Supreme Court, in interpreting the NLRA, indicated:

> [I]n its present application the statute goes no further than to safeguard the right of *employees* to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.
>
> That is a fundamental right. *Employees* have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its own business and select its own officers and agents.

301 U.S. at 33, 57 S.Ct. at 622 (emphasis added). *See International Union v Wisconsin Employment Relations*

Board, 336 U.S. 245, 259, 69 S.Ct. 516, 524, 93 L.Ed. 651 (1948); *Thomas v Collins*, *supra*. It is clear, then, that the right which has been characterized as "fundamental" by the Supreme Court is the right of *employees* to organize for the purposes of collective bargaining or other mutual protection. There is no constitutional right to mandatory collective bargaining. *See Babbitt v United Farm Workers National Union*, 442 U.S. 289, 313, 99 S.Ct. 2301, 2316, 60 L.Ed.2d 895 (1979); *Lontine v Van Cleave*, 483 F.2d 966, 968 (10th Cir. 1973); *Newport News Firefighters Association Local 794 v City of Newport News*, 339 F.Supp. 13, 17 (E.D. Va. 1972); *Atkins v City of Charlotte*, 296 F.Supp. 1068, 1077 (W.D.N.C. 1969). It is equally clear that the right to organize for the purposes of collective bargaining presupposes the existence of an employer-employee relationship. This court finds that the right to engage in collective bargaining is, of necessity, a right which extends to *employees*, and not to *individuals* as plaintiffs suggest. The cases cited by the plaintiffs support this conclusion. *See United Federation of Postal Clerks v Blount*, *supra*; *United Steelworkers, etc. v University of Alabama*, *supra*; *McLaughlin v Tilendis*, 398 F.2d 287 (7th Cir. 1968); *University of New Hampshire Chapter of American Association of University Professors v Haselton*, 397 F.Supp. 107 (D.N.H. 1975); *Police Officers' Guild*, *supra*. In the above-cited cases, there existed an employer-employee relationship between the plaintiffs and the defendants. In *Police Officers' Guild*, *supra*, the District Court for the District of Columbia articulated the distinction this court is attempting to make. That court noted:

> Among the rights so protected [by the Federal Constitution] are the *right of individuals to*

> *associate to further their personal beliefs* and more specifically, with respect to the rights asserted by the complainants in this action, the *right of public employees to organize collectively and to select representatives for purposes of engaging in collective bargaining.*

369 F.Supp. at 551 (footnotes and citations omitted) (emphasis added). Thus, while the First Amendment right to associate together extends to all individuals, the derivative right to engage in collective bargaining extends only to employees. It is well-settled in Florida that the relationship between sheriff and deputy is not that of employer-employee. *See Murphy v Mack, supra; Blackburn v Brorein,* 70 So.2d 293 (Fla. 1954); *Brevard County Police Benevolent Association, Inc. v Brevard County Sheriffs' Department,* 416 So.2d 20 (Fla. 1st DCA 1982); *Szell v Lamar,* 414 So.2d 276 (Fla. 5th DCA 1982). Because this court has already held that it is bound by the Florida Supreme Court's determination that the plaintiff deputy sheriffs are not employees, the court finds that plaintiffs do not have a constitutional right to engage in collective bargaining. Accordingly, neither the defendants' conduct nor the Florida Supreme Court's interpretation of section 447.203(3), *Florida Statutes,* violates any First Amendment right enjoyed by the plaintiffs.

The plaintiffs also claim that the defendants' conduct and the Florida Supreme Court's interpretation of section 447.203(3), *Florida Statutes,* violate their right to collective bargaining guaranteed them by Article I, Section 6 of

the Florida Constitution. Article I, Section 6 of the Florida Constitution provides as follows:

> §6. Right to work
>
> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of *employees*, by and through a labor organization, to bargain collectively shall not be denied or abridged. *Public employees* shall not have the right to strike.

(emphasis added). In *Brevard County Police Benevolent Association, Inc., supra*, the First District Court of Appeal for the State of Florida addressed the question of whether Brevard County deputy sheriffs "enjoy the constitutional right to bargain collectively guaranteed every person/employee of this State by Article I, Section 6 of the Constitution of Florida". The court noted that the section speaks only of employees, not persons, and held that it does not have applicability to persons who are not defined as employees. Finding that it was bound by the Florida Supreme Court's determination that deputy sheriffs are not employees, the District Court of Appeal held that deputy sheriffs do not enjoy a constitutional right to bargain collectively. Because this court has held that it is similarly bound by the Florida Supreme Court's determination that deputy sheriffs are not employees, the court finds that neither the defendants' conduct nor the Florida Supreme Court's interpretation of section 447.203(3), *Florida Statutes*, violates any rights of the plaintiffs under the Florida Constitution.

Finally, the plaintiffs contend that the Florida Supreme Court's interpretation of section 447.203(3), *Florida Statutes*, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. They allege that the Florida Supreme Court's determination, in *Murphy v Mack*, *supra*, that deputy sheriffs are excluded from the coverage of Chapter 447, Part II, *Florida Statutes*, unlawfully discriminates against a subclass of law enforcement officers, i.e., that class of deputy sheriffs who are appointed by constitutional sheriffs. This court's initial inquiry must be as to the interests and rights affected by the classification in order to determine the appropriate standard of review of the equal protection claim. *See Dunn v Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *University of New Hampshire Chapter of American Association of University Professors v Haselton*, *supra*. The court has already held that the Florida Supreme Court's interpretation of section 447.203, *Florida Statutes*, does not violate any First Amendment rights of the plaintiffs. Because the court has found that the classification, created by the state supreme court's interpretation of section 447.203, *Florida Statutes*, does not interfere with a federal "fundamental right", the standard of review to be applied is the rational basis test. Under the rational basis test, statutory classifications are presumed constitutional. As the Supreme Court stated in *City of New Orleans v Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed. 2d 511 (1976):

> Unless a classification trammels fundamental *personal* rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations

and require only that the classification challenged be rationally related to a legitimate state interest.

427 U.S. at 303, 96 S.Ct. at 2516-17 (emphasis added).

The National Labor Relations Act, by express statutory language, excludes from its coverage the State and its agencies. 29 U.S.C. §152(2). As a result, public employees must look to their state legislatures for the authority to engage in collective bargaining. the State of Florida has responded by granting *employees* the right to engage in collective bargaining in its state constitution, and by enacting Chapter 447, Part II, *Florida Statutes*, which confers upon *public employees* the right to engage in collective bargaining. The statute expressly excludes from its coverage those classes of persons who hold their positions by appointment, those persons who work with the Florida Legislature, prisoners in state correctional institutions, and managerial employees, among others. Whether the legislative policy determinations which resulted in those exclusions are wise or desirable is not for this court's determination. As the Supreme Court further noted in *City of New Orleans v Duke*, "the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines". 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511 (1976).

It is clear from a reading of *Murphy v Mack, supra*, that the Florida Supreme Court did not arrive at its determination that deputy sheriffs are appointees in an arbitrary fashion. Rather, the court examined the

unique historical status of deputy sheriffs and concluded that they were not employees within the meaning of section 447.203, *Florida Statutes*. Deputy sheriffs are treated no differently than other appointees, that is, they do not have the right to engage in collective bargaining. The plaintiffs contend that the Equal Protection Clause is violated because they are not treated the same as other law enforcement officers in the State of Florida. This court finds, however, that other law enforcement officers in Florida are different in fact from these deputy sheriffs. "The Constitution does not require things which are different in fact . . . to be treated in law as though they were the same." *Tigner v State of Texas*, 310 U.S. 141, 147, 60 S.Ct. 879, 882, 84 L.Ed. 1224 (1940). Because of the unique historical status of deputy sheriffs, this court finds that their exclusion from the coverage of the Chapter 447, Part II, *Florida Statutes*, is reasonable and is not invidiously discriminatory. Accordingly, the court finds that neither the defendants' conduct nor the Florida Supreme Court's interpretation of section 447.203(3), *Florida Statutes*, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

Accordingly, it is ORDERED:

1. The plaintiffs' motion for summary judgment is DENIED.

2. The defendants' motion for summary judgment is GRANTED.

3. The defendants shall prepare and present a final judgment in accordance with this Order.

4. Costs to be awarded upon proper motion and hearing.

DONE AND ORDERED in chambers at Tallahassee, Florida this 14th day of January, 1983.

/s/ Maurice M. Paul
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-3158

D.C. Docket No. 80-00907

LARRY SIKES, JULIE BENSON, WILLIE REAMS, WILLIAM STAFFORD, AND THE FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., for themselves and all others similarly situated,

Plaintiffs-Appellants,

versus

EDDIE BOONE, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Florida

Before FAY and HENDERSON, Circuit Judges, and BOYLE*, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 13, 1983
For the Court: Spencer D. Mercer, Clerk

ISSUED AS MANDATE: JAN 4 1984

By: /s/ [illegible]
[illegible]

*Honorable Edward J. Boyle, Sr., U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-3158

LARRY SIKES, JULIE BENSON, WILLIE REAMS, WILLIAM STAFFORD, AND THE FLORIDA POLICE BENEVOLENT ASSOCIATION, INC., for themselves and all others similarly situated,

Plaintiffs-Appellants,

versus

EDDIE BOONE, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(December 13, 1983)

Before FAY and HENDERSON, Circuit Judges, and BOYLE*, District Judge.

PER CURIAM:

The judgment appealed is affirmed based upon and for the reasons expressed in the opinion rendered by the district court and reported at 562 F.Supp. 74.

AFFIRMED.

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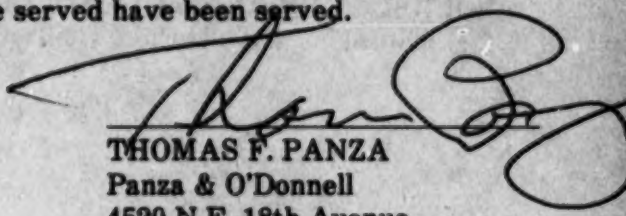
*Honorable Edward J. Boyle, Sr., U.S. District Judge for the Eastern District of Louisiana, sitting by designation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9 day of March, 1984, three copies of the Petition were mailed, postage prepaid, to JULIUS F. PARKER, Esquire, Post Office Box 669, Tallahassee, Florida 32302-0669, Counsel for Respondents. I further certify that all parties required to be served have been served.



THOMAS F. PANZA
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4520 N.E. 18th Avenue
Fort Lauderdale, Florida 33334

83 - 1491

No.

Supreme Court, U.S.
FILED
APR 9 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1983

LARRY SIKES, et al.,
Petitioners,

vs.

EDDIE BOONE, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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In the Supreme Court of the United States

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondents urge the Court, for the reasons set out hereinafter, to deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

Respondents will accept Petitioners' Statement of the Case.

ARGUMENT

PETITIONERS' POINT I

The Decision Below Has Decided a Federal Question in a Manner Inconsistent With Applicable Decisions of This Court.

Petitioners in this case have claimed the right to bargain collectively pursuant to both the Constitution of the State of Florida and under the United States Consti-

tution. Their claim under the Florida Constitution is based on *Article I, Section 6* of the *Florida Constitution*, which provides as follows:

> "§6. Right to work
>
> The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of *employees*, by and through a labor organization, to bargain collectively shall not be denied or abridged. *Public employees* shall not have the right to strike." [Emphasis supplied]

The Supreme Court of Florida in the case of *Murphy v. Mack*, 358 So. 2d 822 (Fla. 1978), has foreclosed any question as to the rights of the Plaintiff class under the Florida Constitution. That case squarely held that Deputy Sheriffs under common law or constitutional sheriffs are not public employees. Since *Article I, Section 6* of the *Florida Constitution* grants the right to bargain collectively to "employees", and since the Florida Supreme Court has held that the Plaintiff Class are not employees, the Supreme Court's decision in *Murphy v. Mack*, supra, is conclusive as to any rights asserted by the Plaintiff Class under the Florida Constitution.

As to the claim of denial of equal protection under United States Constitution, the position of the Plaintiff Class is equally without merit. In Florida there are two different types of Sheriffs. The first type is the Sheriff of a Charter County or a Sheriff in a County which, by Special Act of the Legislature, has a civil service system applying to Deputy Sheriffs. In those Counties the Sheriff does not have absolute discretion in hiring and firing of Deputies, but he is likewise not burdened by a strict liability as to their actions. Rather, his liability

for his Deputies is governed by traditional doctrines of respondeat superior.

The second type of Sheriff is the traditional common law or constitutional Sheriff and all members of the Defendant Class are such common law or constitutional sheriffs. Their Deputies are appointed and have the same power as the Sheriff appointing them pursuant to *Florida Statutes, Section 30.07,* which provides as follows:

"30.07 Deputy sheriffs

> Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible."

Since *Section 30.07, Florida Statutes,* imposes virtually strict liability on common law or constitutional sheriffs for the actions of their deputies within the scope and course of their employment, the Florida Courts have consistently held that such a Deputy has no property right in his job and the Sheriff appointing him has absolute discretion as to hiring, firing, termination, promotion, discipline and deployment of such deputies. *Murphy v. Mack,* 358 So. 2d 822 (Fla. 1978); *Blackburn v. Brorein,* 70 So. 2d 293 (Fla. 1954); and *Szell v. Lamar,* 414 So. 2d 276 (Fla. 5th DCA 1982). The distinction between a deputy sheriff working in a charter county or under a civil service system on the one hand, and a deputy appointed by a constitutional sheriff on the other, is a distinction with a real difference, as the Courts of Florida and the District Court in the case at bar correctly held.

As the Supreme Court of Florida stated in *Blackburn v. Brorein,* 70 So. 2d 293 (Fla. 1954):

"There is a reason for the constitutional provisions and statutes with reference to sheriffs and deputy sheriffs. In our scheme of constitutional government we find throughout an attempt to place responsibility upon a particular officer or a particular class of officers. The supreme executive power of the State is vested in a chief executive styled the Governor. There can be only one Governor upon whom the people can place responsibility. He is clothed with the appointing power in many cases and he is responsible for his assistants. The judicial power is vested in the courts and that power cannot be shared with the executive or legislative power. It is essential to law enforcement in the various counties of the State that the people shall be able to place responsibility upon a particular individual, the sheriff. *He and he alone appoints his deputies and is responsible for them.* It was never contemplated that the sheriffs of the state must perform the powers and duties vested in them through deputies or assistants selected by someone else." 70 So. 2d at 298. [Emphasis supplied]

The distinction between a deputy or police officer under a civil service system or under a chartered county government on the one hand and an appointed deputy sheriff under a constitutional sheriff on the other, has likewise been recognized by the Federal Courts, and specifically by the United States Court of Appeals for the Fifth Circuit. In *Madison v. Gerstein*, 440 F. 2d 338 (5th Cir. 1971), the Court was confronted with an action against E. Wilson Purdy, Director of Public Safety and Sheriff of Dade County. Dade County was at that time and still is, what is referred to by Petitioners in their Complaint as a Charter County, in that in 1956 a consti-

tutional amendment was adopted which permitted Dade County to adopt the Home Rule Charter under which the Board of County Commissioners would be the governing body. That Charter, as adopted, abolished the constitutional office of Sheriff and transferred all the functions and duties of the Sheriff to a newly created public safety department headed by a Public Safety Director, also known as the Metropolitan Sheriff. The Defendant E. Wilson Purdy occupied that position and the Plaintiffs in the case attempted to argue that the Director of the Department of Public Safety should be liable for the acts of his Deputies and police officers within the scope and course of their authority pursuant to *Florida Statutes, Section 30.07*, which provided then as it provides now:

> "Sheriffs may appoint deputies to act under them who shall have the same power as the sheriff appointing them, and for the neglect and default of whom in the execution of their office the sheriff shall be responsible."

The United States District Court for the Southern District of Florida dismissed the case against the Defendant Purdy on the grounds that he was not liable for the acts of his deputy which he did not direct and of which he had no personal knowledge. The Fifth Circuit in affirming that dismissal made the following holding of law:

> "The basis for the distinction is said to be that, traditionally, sheriff's deputies act in the name of the sheriff in a representative capacity, whereas a police officer, like the police chief, is a public servant in his own right. Jordan v. Kelly, 223 F. Supp. 731, 738 (W.D.Mo. 1963). Underlying this rationale is

the difference in selection and tenure between the sheriff and the police chief, and the employment of their subordinates.

This is a matter controlled by Florida law. We have been cited no Florida cases or legislative authority which determine the point.

However, we believe that Purdy's argument is sound and that it is reasonable to assume that Florida would so hold, if confronted squarely with this issue. To assume otherwise would require the conclusion that Florida would burden this office with derivative liability even though it has excised the basic characteristics of the traditional sheriff's office which supported such liability.

We sustain the District Court's dismissal of this case against E. Wilson Purdy, the Public Safety Director and Sheriff on the ground that he is not liable for the acts of his deputy which he did not direct and of which he had no personal knowledge." 440 F. 2d at 342. [Emphasis supplied]

Murphy v. Mack, supra, arose when the Public Employees Relations Commission determined that deputy sheriffs under Sheriff Ernest P. Murphy of Osceola County and under Sheriff William Heidtman of Palm Beach County, were public employees within the meaning of *Chapter 447, Florida Statutes*. The Sheriffs appealed that decision to the District Court of Appeal for the First District which affirmed at 341 So. 2d 1008. The Florida Supreme Court granted certiorari on the basis that the decision affected a class of constitutional officers and reversed both the First District and the Public Employees Relations Commission. The Supreme Court of Florida in its decision quotes with approval the following descrip-

tion of the office of deputy from *70 Am. Jur. 2d, Sheriffs, Police and Constables, Section 2*:

> "The office of under or deputy sheriff is a common-law office; and this is the rule unless a change is effected by the constitution or statute law of the state. He holds an appointment, as distinguished from an employment. Where so clothed with power, a deputy sheriff is a public officer, although he may not be a state or municipal officer within the meaning of constitutional provisions. A deputy sheriff is a public officer under laws which require his appointment by the sheriff to be approved by a judge, and which provide that he must take an oath of office, and confer on him powers and duties equal to those of the sheriff himself. As such, he has been held not subject to civil service regulations. And in the absence of specific language including deputy sheriffs, a deputy sheriff has been held to be an official, and not an employee, of a county, within the meaning of a workmen's compensation act. A deputy sheriff has been held to be embraced within the words 'or other county officer' contained in a statute relating to jury service, and, a special deputy, or one employed in particular cases, has been held to be an officer of the state under a statutory provision relating thereto." 358 So. 2d at 825.

The Court concludes its opinion with this direct holding of law:

> "Accordingly, we hold that a sheriff is a 'public employer' within the definition of Chapter 447, Florida Statutes (1975), *but that a deputy sheriff is not a 'public employee' within the contemplation of said act.*" 358 So. 2d at 826. [Emphasis supplied]

The decision of the Seventh Circuit in *Confederation of Police v. City of Chicago*, 547 F. 2d 375 (7th Cir. 1977), is directly on point. In *Confederation of Police v. City of Chicago*, supra, the Plaintiff, which was a Union similar to the Florida Fraternal Order of Police and the Police Benevolent Association, brought suit against the City of Chicago seeking a decision requiring the City of Chicago to bargain collectively with the Confederation of Police as representing police officers of the City of Chicago. The United States District Court for the Northern District of Illinois dismissed the action, 382 F. Supp. 624, and the Plaintiffs appealed to the Seventh Circuit. The Seventh Circuit at 529 F. 2d 89 (1976) affirmed in part and reversed in part. The decision of the District Court was affirmed as to the equal protection argument and as stated at page 93 of the Opinion held:

> "In this action the District Court went on to hold that even if there was differential treatment of civil service employees, it was not violative of the equal protection clause because there exists a rational basis for the differential treatment, and the Legislature is not required to treat all groups alike. It is unnecessary for this Court to reach this issue." 529 F. 2d at 93.

The City of Chicago sought certiorari in the U. S. Supreme Court which vacated the decision of the Seventh Circuit and remanded for further consideration in light of several cited decisions at 49 L.Ed.2d 1196. On remand the Seventh Circuit affirmed the decision of the District Court on the question of due process on the basis that Chicago Police Officers had no property interest in their jobs under State law of Illinois. As the Seventh Circuit states on remand:

> "Our previous decision was bottomed on the premise that a Chicago patrol officer has a property

interest, protected by the due process clause, in the conditions of his employment. Because we found that a patrol officer had a state law entitlement to a particular situation or job, we held that he could not be transferred to a job imposing substantially greater burdens or with less pay without the provision of procedural due process. It is now clear that our underlying premise was erroneous. In Bishop v. Wood, the Supreme Court held that the existence of a property interest in public employment cognizable under the due process clause depends on whether state law has affirmatively created an expectation that a particular employment relationship will continue unless certain defined events occur. See 426 U.S. at 344, 96 S. Ct. at 2078. See also Paul v. Davis, 424 U. S. 693, 710-712, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (a property interest attains constitutional status by virtue of initial recognition and protection by state law).

There is no Illinois law, whether from a statutory, regulatory, or judicial source, that protects a Chicago patrol officer from adverse action short of discharge or suspension by the Police Department. In its earlier opinion, this court cited Ill. Rev. Stat. Ch. 24, §10-1-18.1, as a source of protection for a patrol officer's particular job conditions. This statute, however, is limited by its own terms to discharges or suspensions.

Absent affirmative recognition in Illinois law of an entitlement to particular job conditions, plaintiff's due process claim must fail. Accordingly, the judgment of the district court is affirmed, with costs in the Supreme Court as well as costs of appeal allowed to appellee." 547 F. 2d at 376.

It is clear from the Florida Supreme Court's decision in *Murphy v. Mack*, supra, that Deputy Sheriffs appointed by constitutional Sheriffs in Florida have no property interest in their jobs. This was the square holding of the United States District Court for the Middle District of Florida in *Tanner v. McCall*, 441 F. Supp. 503 (N.D. Fla. 1977), in which:

> "The Court concludes that plaintiffs had no property interests under Florida law in their jobs as Lake County Sheriff's deputies. Therefore no Fourteenth Amendment due process guarantees are required." 441 F. Supp. at 509.

Petitioners in this case have no claim under due process because appointed Sheriff's deputies have no property interest in their jobs. They have no claim under equal protection of the laws because there is a valid and very real distinction between law enforcement officers such as police officers, highway patrol officers and the like who truly are employees, and deputy sheriffs appointed by constitutional Sheriffs, who are clearly officers whose powers derive solely from the Sheriff appointing them. A Deputy Sheriff is simply the alter ego of the Sheriff and the Sheriff is almost strictly liable for his deputy's actions within the scope and course of his employment. There being a valid and rational distinction between such deputies and other law enforcement officers and employees of the State of Florida, Plaintiffs have no claim of violation of equal protection of the laws.

The Florida Courts have consistently upheld the philosophy set forth by the Supreme Court in *Murphy v. Mack*, supra. In a case decided while the case at bar was pending before the District Court, *Szell v. Lamar*, 414 So. 2d 276 (Fla. 5th DCA 1982), the Court expressed it as follows:

"A sheriff is authorized to appoint deputies for whose acts he is responsible, to act in his stead. Section 30.07, Florida Statutes (1981). A deputy sheriff holds office by appointment, rather than by employment, and is thus an officer, rather than an employee. Murphy v. Mack, 358 So. 2d 822 (Fla. 1978). The Sheriff has absolute control over the selection and retention of deputies in order that law enforcement be centralized in the county and in order that the people be able to place responsibility upon a particular officer for failure to law enforcement. Section 30.53, Florida Statutes (1981); Tanner v. McCall, 625 F. 2d 1183 (5th Cir. 1980); Blackburn v. Brorein, 70 So. 2d 293 (Fla. 1954); Murphy, 358 So. 2d at 825. Thus, a deputy sheriff has no property interest in his office and no constitutional due process protections when he is dismissed." 414 So. 2d at 277, 278.

In another decision while the case at bar was pending before the District Court, and in which the Plaintiff was represented by counsel for the Petitioners herein, *Brevard County Police Benevolent Association, Inc. v. Brevard County Sheriff's Department, et al.*, 416 So. 2d 20 (Fla. 1st DCA 1982), the Court held as follows:

"The Association urges on appeal that the Commission's decision violates *the equal protection clause* of the United States Constitution and the basic rights and provisions of the Florida Constitution. The phrasing of the specific question on appeal reveals the flaw in the Association's position: 'Whether the deputy sheriffs of the Brevard County Sheriff's Department enjoy the constitutional right to bargain collectively guaranteed every person/employee of this State by Article I, Section 6 of the Constitution of Florida,' Article I, Section 6 speaks only of *em-*

ployees, not persons and does not, therefore, have applicability to persons who are not defined as *employees*. The Florida Supreme Court has already held that appointed deputy sheriffs are not 'employees' within the meaning of Chapter 447, rather they are 'officers.' Murphy v. Mack, 358 So. 2d 822 (Fla. 1978). This determination was not based simply on the statute, but was an interpretation of common law. In so ruling, the court stated that the deputies' status, having arisen out of common law, could be changed by explicit provision in state statutes or appropriate local government law." 416 So. 2d at 21. [Emphasis supplied]

The cases cited above were carefully considered by the District Court, which is clear from the conclusion of the Court's Memorandum Opinion dated January 14, 1983, 562 F. Supp. 74 (N.D. Fla. 1983) as follows:

"It is clear from a reading of *Murphy v. Mack, supra*, that the Florida Supreme Court did not arrive at this determination that deputy sheriffs are appointees in an arbitrary fashion. Rather, the court examined the unique historical status of deputy sheriffs and concluded that they were not employees within the meaning of section 447.203, *Florida Statutes*. Deputy sheriffs are treated no differently than other appointees, that is, they do not have the right to engage in collective bargaining. The plaintiffs contend that the Equal Protection Clause is violated because they are not treated the same as other law enforcement officers in the State of Florida. *The court finds, however, that other law enforcement officers in Florida are different in fact from these deputy sheriffs.* The Constitution does not require things which are different in fact . . . to be treated in law

as though they were the same.' *Tigner v. State of Texas*, 310 U.S. 141, 147, 60 S. Ct. 879, 882, 84 L. Ed. 1224 (1940). Because of the unique historical status of deputy sheriffs, this court finds that their exclusion from the coverage of the Chapter 447, Part II, *Florida Statutes*, is reasonable and is not invidiously discriminatory. Accordingly, the court finds that neither the defendants' conduct nor the Florida Supreme Court's interpretation of section 447.203(3), *Florida Statutes*, violates the Equal Protection Clause of the Fourteenth amendment of the United States Constitution." 562 F. Supp. at 81. [Emphasis supplied]

The decisions of the District Court for the Northern District of Florida and the Court of Appeals for the Eleventh Circuit are both in perfect accord with controlling Federal case law.

PETITIONERS' POINT 2

The Decision Below Has Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

Petitioners contend in this Court, as they have consistently throughout the history of this litigation, that there is a fundamental constitutional right to collective bargaining for all persons who work for a governmental entity. Petitioners have cited no authority whatsoever for that contention, perhaps because there is none.

The decisions below have not decided any questions which have not already been decided by this Court. This Court, in a case cited by the Trial Judge in his Memorandum Opinion, *Babbitt v. United Farm Workers Na-*

tional Union, 442 U.S. 289, 60 L.Ed.2d 895, 99 S. Ct. 2301 (1979), had occasion to rule on the question of whether there is a constitutional right to collective bargaining. This Court disposed of that question as follows:

> "Accepting that the Constitution guarantees workers the right individually or collectively to voice their views to their employers (citations omitted) the Constitution does not afford such employees the right to compel employers to engage in a dialogue or even to listen." 60 L.Ed.2d at 915, 916.

CONCLUSION

Petitioners herein seek to have this Court reverse a decision of the highest Court of the State of Florida on a question of Florida law. The decisions of both lower Courts are perfectly in accord with established Federal case law. Certiorari should be denied.

Respectfully submitted, this 6th day of April, 1984.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to:

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